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NEXTDOOR.COM, INC.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

NEXTDOOR.COM, INC., a Delaware
corporation,

Plaintiff,

v.

RAJ ABHYANKER, an individual,

Defendant.

Case No.: 3:12-cv-05667-EMC-NMC

**NEXTDOOR.COM, INC.'S
SUPPLEMENTAL BRIEFING ON ITS
MOTION FOR SUMMARY
JUDGMENT ON COUNT IV OF ITS
COMPLAINT [PER DOCKET 357]**

Date: October 16, 2014
Time: 1:30 p.m.
Courtroom: 5, 17th Floor
Judge: Hon. Edward M. Chen

1 Nextdoor.com, Inc. submits this brief pursuant to the Court's Order re Supplemental
2 Briefing (Dkt. No. 357) directing the parties to address why the Stipulation (Dkt. No. 192) and
3 Partial Final Judgment (Dkt. No. 193) does not constitute a judicial admission, by Abhyanker,
4 that the NEXTDOOR mark is valid and enforceable.

5 Nextdoor.com submits that they do constitute judicial admissions, and that this is yet
6 another (and related) basis to preclude Abhyanker from making any arguments to the contrary,
7 including his new argument, minted in opposition to the pending summary judgment motion, that
8 the NEXTDOOR mark is not distinctive. That argument not only defies the undisputed facts, but
9 flies in the face of his admissions contained in: (1) the Stipulation and Partial Final Judgment; (2)
10 his pleadings; and (3) other filings both here and before the TTAB, as detailed in Nextdoor.com's
11 prior briefing on this motion (Dkt. Nos. 332 and 348-3). The Court thus can and should quickly
12 dispense with Abhyanker's about-face attack on the validity of the NEXTDOOR mark.¹

13 **I. ABHYANKER'S STIPULATION CONSTITUTES A JUDICIAL ADMISSION OF**
14 **ALL FACTS STATED OR NECESSARILY IMPLIED THEREIN**

15 The law is clear: "Stipulations are treated as judicial admissions." *Matter of Christian &*
16 *Porter Aluminum Co.*, 584 F.2d 326, 334 (9th Cir. 1978) (citing 9 WIGMORE ON EVIDENCE (3d
17 Ed. 1940) § 2588 at 581); *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 454 F.Supp.2d
18 966, 972 (C.D. Cal. 2006) (identifying stipulations as one form of judicial admission); *Gray Line*
19 *Co. v. Goodyear Tire & Rubber Co.*, 280 F.2d 294, 298 (9th Cir. 1960) (holding that a statement
20 in a stipulation constituted a judicial admission). Because Abhyanker stipulated that
21 "Nextdoor.com, Inc. owns trademark rights in and has priority of use of the NEXTDOOR mark in
22 the field of online social networking" (Dkt. 192), he cannot now reverse course and assert that
23 Nextdoor.com does not own trademark rights in that mark. *See Am. Title Ins. Co. v. Lacelaw*
24 *Corp.*, 861 F.2d 224, 226 (9th Cir. 1988) (judicial admissions, including stipulations, are
25 conclusively binding on the party who made them).

26 Significantly, this conclusively binding effect is not limited to the precise facts or wording

27 ¹ Two additional reasons why summary judgment should be granted that were addressed in
28 Nextdoor.com, Inc.'s prior briefing are issue preclusion [Dkt. 349 at 4-7] and the absence of
material facts in dispute [Dkt. 349 at 7-14].

1 used in the stipulation. The Ninth Circuit has held in an analogous case that facts that necessarily
 2 are implied from a stipulation are also treated as judicial admissions. In *Fernhoff v. Tahoe Reg'l*
 3 *Planning Agency*, the plaintiff had a stipulation that said he was required to obtain an
 4 administrative permit from a planning agency before beginning work on a road, yet the plaintiff
 5 later argued that his proposed development had been deemed approved by the planning agency.
 6 The court reasoned that if the plaintiff had stipulated that he needed to obtain a permit before
 7 beginning work, then, by implication, the development could not have been deemed approved by
 8 the planning agency, despite Fernhoff's contention that the planning agency had effectively
 9 approved the project years before and would issue the final permit in due course. This is
 10 analogous to our case, where Abhyanker is trying to evade the necessary implication of his
 11 stipulation that Nextdoor.com owns rights in the NEXTDOOR mark, since distinctiveness and
 12 validity are prerequisites to ownership, just like Fernhoff's administrative permit was a
 13 prerequisite to planning agency approval. 803 F.2d 979, 985 (9th Cir. 1986). Indeed, as
 14 Nextdoor.com previously explained (*see* Dkt.331 (Motion for Summary Judgment) at 20; Dkt.
 15 349 (Reply ISO MSJ) at 4-5)), one cannot "own" rights in a mark that is not valid, and, a mark
 16 cannot be valid unless it is distinctive. *See* J. McCarthy, *McCarthy on Trademarks and Unfair*
 17 *Competition* § 11:2, (4th ed. 2004) ("Without achieving distinctiveness... a designation does not
 18 have the legal status of a 'trademark' or 'service mark.' No distinctiveness-no mark."). Thus,
 19 Abhyanker's judicial admission that Nextdoor.com "owns trademark rights in and has priority of
 20 use of the NEXTDOOR mark in the field of online social networking" necessarily extends to
 21 facts underlying the conclusion that Nextdoor.com has trademark rights in the mark, including
 22 that the mark is valid and enforceable.²

23
 24
 25 ² Given that Abhyanker's judicial admissions were made in the context of a stipulated judgment,
 26 the preclusive effect should be even more pronounced. There are significant limitations on a
 27 party's ability to attack a judgment in subsequent proceedings. *See Nasalok Coating Corp. v.*
 28 *Nylok Corp.*, 522 F.3d 1320 (Fed. Cir. 2008) (prohibiting later challenge to validity of a
 trademark in cancellation proceedings because prior default judgment had already established
 trademark rights; to allow otherwise would constitute an impermissible collateral attack and
 would impair competitors' rights as previously established).

II. TRADEMARK DISTINCTIVENESS IS PROPERLY THE SUBJECT OF A JUDICIAL ADMISSION

Abhyanker cannot argue that his admissions were of statements of law, which this Court has recognized may fall outside the concept of judicial admissions. *Lam Research Corp. v. Schunk Semiconductor*, No. C-03-1335 EMC, 2014 WL 4180935 at *5 (N.D. Cal. Aug. 22, 2014) (only statements of fact can constitute judicial admissions). Rather, as this Court also has previously recognized, trademark validity is a question of fact—albeit facts that Nextdoor.com believes present no material dispute here. *Humboldt Wholesale, Inc. v. Humboldt Nation Distribution, LLC*, C-11-4144 EMC, 2012 WL 2572065 at *3 (N.D. Cal. July 2, 2012) (citing *Zobmondo Entm't, LLC v. Falls Media, LLC*, 602 F.3d 1108, 1113 (9th Cir. 2010)). Therefore, Abhyanker's admission that the NEXTDOOR mark is valid and owned by Nextdoor.com, Inc. is a factual admission that is properly within the scope of judicial admissions.³

III. ABHYANKER'S ADMISSION WAS DELIBERATE, CLEAR AND UNAMBIGUOUS.

As this Court also recognized in *Lam*, a judicial admission must be deliberate, clear and unambiguous. *Lam*, 2014 WL 4180935 at *5. Abhyanker's readily meets this standard.

To begin with, the language of the Stipulation and Partial Final Judgment is clear as a bell. Abhyanker stipulated to and the Court entered its Judgment that: "Nextdoor.com, Inc. owns trademark rights in and has priority of use of the NEXTDOOR mark in the field of online social networking." See Dkts. 192 and 193. The only reasonable reading of this judicial admission is that Nextdoor.com owns valid and enforceable trademark rights in the NEXTDOOR mark. There is no such thing as trademark rights in an invalid and unenforceable mark. See *McCarthy*, § 11:2; *Lahoti v. VeriCheck, Inc.*, 586 F. 3d 1190, 1197 (9th Cir. 2009).

Abhyanker was well aware of the gravity of his admission. It was Nextdoor.com's valid

³ As Section III.B of Nextdoor.com, Inc.'s Reply brief makes clear, even though trademark validity is a question of fact, it can still be determined by a court when there is no material dispute from which a reasonable jury could reach a different conclusion. See also *Survivor Media, Inc. v. Survivor Productions*, 406 F.3d 625, 631-32 (9th Cir. 2005) (considering various attributes of the mark on summary judgment and finding mark to be suggestive, and therefore protectable); *Rearden LLC v. Rearden Commerce, Inc.*, 683 F.3d 1190, 1211 (9th Cir. 2012) (affirming lower court's determination at summary judgment that mark was suggestive).

1 and enforceable trademark rights that formed the basis of the Court’s injunction against
 2 Abhyanker prohibiting him from ever using the NEXTDOOR mark. Moreover, as the self-
 3 proclaimed filer of more trademark applications than anyone else in the world (*See* Dkt. 150-1 ¶¶
 4 3 & 4 & Ex. A thereto), Abhyanker certainly was aware of the implications of his judicial
 5 admission. He understood that when he voluntarily stipulated to Nextdoor.com, Inc.’s ownership
 6 and priority in this mark (and reaped the benefits of that stipulation, namely, avoiding a Rule 11
 7 motion⁴), he was conceding the mark’s validity. Indeed by that same stipulation, he dismissed
 8 with prejudice his own claims based on his alleged rights in the same “NEXTDOOR” mark which
 9 he previously had asserted was a *valid* mark. SAAC, ¶¶ 202-207.

10 Finally, the inclusion of language in the Stipulation stating that “[n]othing in this
 11 Stipulation shall be construed as an admission of liability or wrongdoing of any kind by any of
 12 the parties hereto,” [Dkt. 192 ¶ 4] does nothing to diminish the conclusion that Abhyanker has
 13 admitted the mark’s validity and enforceability. Rather this provision clarified that while the
 14 parties had stipulated to certain facts—including Nextdoor.com’s trademark rights—Abhyanker
 15 was not conceding he committed the ultimate wrong on other causes of action. Thus, the
 16 Stipulation did not resolve the remaining elements of Nextdoor.com’s infringement and
 17 cybersquatting claims, such as Abhyanker’s use of the NEXTDOOR mark and www.nextdoor.cm
 18 domain, the likelihood of confusion stemming from this use, and Abhyanker’s bad faith.

19 Any suggestion that Abhyanker’s non-admission regarding *liability* takes away from his
 20 admission of *facts* in the stipulation would defy both logic and the Court’s prior holding. In
 21 agreeing to an injunction and declaration resolving Nextdoor.com’s claim that acknowledged its
 22 trademark rights in the NEXTDOOR mark, what could Abhyanker have been stipulating to if not
 23 the validity and enforceability of Nextdoor.com’s NEXTDOOR mark? Indeed, as Abhyanker
 24 himself explained in his Opposition, the Stipulation leaves unaffected those claims not stipulated
 25 to, but *did* resolve Nextdoor.com’s claim for Declaratory Relief, which was premised on the

26 ⁴ As Nextdoor.com explained in footnote 2 of its opening brief [Dkt. No. 332 at 2], Abhyanker
 27 entered into the Stipulation and Partial Judgment following service of Nextdoor.com’s Rule 11
 28 motion directed at the baselessness of his allegation that he used the NEXTDOOR mark in
 commerce before Nextdoor.com did.

1 theory that Nextdoor.com had priority of use in the NEXTDOOR mark. *See* Dkt. 345 at 8.

2 Under the Declaratory Relief claim, the Court’s Partial Judgment followed from Abhyanker’s
3 judicial admission that Nextdoor.com owns trademark rights in the NEXTDOOR mark.

4 Imagine, by analogy, that the stipulation Abhyanker entered into was that Nextdoor.com
5 owned a navy blue Maserati, with the license plate number XYZ1234. Such a stipulation is
6 logically premised on the fact that a navy blue Maserati, with the license plate numbered
7 XYZ1234 in fact exists. Those facts would necessarily be admitted by entry of a stipulation that
8 Nextdoor.com owned that specific car. The same is true here—Abhyanker’s judicial admission
9 of Nextdoor.com’s ownership in the NEXTDOOR mark necessarily includes his admission of the
10 factual predicate that a valid and enforceable NEXTDOOR mark exists. And even if the Maserati
11 stipulation included a provision that Abhyanker was not admitting to any “liability or
12 wrongdoing” this would not change the underlying admission that the Maserati exists. Rather,
13 the exclusion of “liability or wrongdoing” would only mean that Abhyanker had not made the
14 separate admission regarding another ultimate wrong: *e.g.*, that he stole or damaged the blue
15 Maserati in question. Here, the Stipulation does not alone resolve Abhyanker’s “liability or
16 wrongdoing” regarding the ultimate wrong: infringement or bad faith cybersquatting. That
17 limitation, however, does nothing to alter the essence of the Stipulation, namely the existence,
18 ownership and priority of Nextdoor.com’s valid and enforceable NEXTDOOR mark.

19 **IV. ABHYANKER IS ALSO JUDICIALLY ESTOPPED FROM DENYING HIS**
20 **PRIOR JUDICIAL ADMISSIONS.**

21 Related to a judicial admission, the doctrine of judicial estoppel provides yet another basis
22 for finding that Abhyanker has conceded the validity and enforceability of the NEXTDOOR
23 mark. The Supreme Court has identified three factors that courts may consider in determining
24 whether to apply judicial estoppel. *New Hampshire v. Maine*, 532 U.S. 742 (2001); *Hamilton v.*
25 *State Farm Fire & Cas. Co.*, 270 F.3d 778, 782 (9th Cir. 2001). First, a party’s later position
26 must be “clearly inconsistent” with its earlier position. Second, courts ask whether the party has
27 succeeded in persuading a court to accept that party’s earlier position, so that judicial acceptance
28 of an inconsistent position in a later proceeding would create “the perception that either the first

1 or the second court was misled.” *Edwards v. Aetna Life Ins. Co.*, 690 F.2d 595, 599 (6th Cir.
 2 1982). Third, courts ask whether the party seeking to assert an inconsistent position would derive
 3 an unfair advantage or impose an unfair detriment on the opposing party if not estopped. *See*
 4 *Davis v. Wakelee*, 156 U.S. 680, 689 (1895); *Scarano v. Central R.R. Co.*, 203 F.2d 510, 513 (3d
 5 Cir. 1953) (judicial estoppel forbids use of “intentional self-contradiction ... as a means of
 6 obtaining unfair advantage”).

7 Here, Abhyanker’s Stipulation meets each of the Supreme Court’s judicial estoppel
 8 factors. Abhyanker’s positions are clearly inconsistent since he now claims Nextdoor.com does
 9 not own trademark rights in the NEXTDOOR mark. Abhyanker previously persuaded the Court
 10 to enter a judgment based on his concessions regarding Nextdoor.com’s trademark rights. A
 11 contrary judgment here would be so inconsistent that it would necessarily create the impression
 12 that Abhyanker misled the Court. Finally, Abhyanker’s inconsistent position unfairly prejudices
 13 Nextdoor.com who relied on the finality of the Court’s judgment both in its prosecution of this
 14 action and its waiver of certain damages against Abhyanker. See Dkt. 192 at ¶ 3.

15 **V. CONCLUSION**

16 Abhyanker’s statements in pleadings, various filings, and Stipulation and Partial Judgment
 17 constitute an unambiguous judicial admission that the NEXTDOOR mark is valid and
 18 enforceable.⁵ No other language in the Stipulation or elsewhere could change this admission and
 19 Abhyanker should be precluded from once again trying to backtrack on his settled admissions.

20 Dated: October 15, 2014

FENWICK & WEST LLP

22 By: /s/ Jennifer L. Kelly

Jennifer Kelly

24 Attorneys for Plaintiff
 NEXTDOOR.COM, INC.

25 ⁵ Abhyanker has also judicially admitted the likelihood of confusion between his use of the
 26 NEXTDOOR mark and Nextdoor.com’s use, alleging precisely such confusion in his own
 27 pleadings, as noted in Nextdoor.com’s opening brief. Dkt. No. 332 at 16-17 (citing Abhyanker’s
 28 Second Amended Counterclaim, Dkt. 132 at ¶ 177 (“There has been and continues to be actual
 confusion between Nextdoor.com’s use of the NEXTDOOR name and mark with Abhyanker’s
 Nextdoor concept and mark”)).